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October Term, 1980

SUPREME COURT OF THE UNITED STATES

ROBERT OKIN, MICHAEL GILL AND
WILLIAM MALAMUD,
Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY
BYBEL, JAMES COLLERAN, DONNA HUNT,
WILLIE WADSWORTH, AND HAROLD WARNER,
Respondents.

REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Applebaum, P.S., Gutheil, T.G., "The Boston State Hospital Case 'Involuntary Mind Control, the Constitution and the Right to Rot'", 137 Am.J.Psychiatry 720 (1980) 9

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Curran, W.J., "Law - Medicine Notes The Management of Psychiatric Patients: Courts, Patients' Representatives, and the Refusal of Treatment", 302 New England Journal of Medicine 1297 (1980) 9

Ford, M.D., "The Psychiatrist's Double Bind: The Right to Refuse Treatment", 137 Am.J. Psychiatry 332 (1980) 9

Stone, A., "Recent Mental Health Litigation: A Critical Perspective", 134 Am.J. Psychiatry 273 (1977) 9

STATEMENT OF THE CASE

Petitioners adopts by reference the statement of the case set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

ARGUMENT

I. The Massachusetts Supreme Judicial Court Case Of In Re Guardianship of Richard Roe Will Not Obviate The Need Of This Court To Reach The Constitutional Issues Presented In This Case.

The respondents, in their opposition to No. 80-1417, argue that the Massachusetts Supreme Judicial Court has a pending case, In Re Guardianship of Richard Roe, No. 80-2257, which may obviate the need for this Court to reach many of the constitutional questions and issues presented in this case.

In fact, the issues of state law in Roe are only peripherally related to the issues in Okin and their resolution would not obviate the need for a constitutional ruling by this Court. The constitutional issues in Roe overlap with the constitutional issues in Okin, and there is no reason for this Court to defer its decision pending a decision by the Massachusetts Supreme Judicial Court.

The Roe case arose in a significantly different context than the Okin case. Roe was a patient at Northampton State Hospital, temporarily committed for observation, when he first refused his antipsychotic medication. Roe Supplement Appendix, at p. 13. The medical director of the hospital, acting in accordance with the temporary restraining order in Okin, sought to

have a guardian appointed for Roe. Thus, unlike in Okin, there is no dispute as to whether a guardian must first be sought before a patient can be forcibly medicated; rather, that fundamental constitutional issue is being litigated in Okin and was simply being followed in Roe.

The dispute in Roe arose after the Northampton medical director sought a guardian; at that time, Roe's guardian-ad-litem argued that even if the guardian was appointed, the guardian under Massachusetts law does not have independent authority to consent to antipsychotic medication for his ward. The guardian-ad-litem aruged that a separate court hearing must be held to determine what the patient would want if competent to decide. Thus, the issue in Roe is the following: if patients have a constitutional right to refuse treatment, and if a guardian must first be obtained to consent to forcible medication, under Massachusetts state law, can the guardian consent to treatment without further judicial authorization. It is incumbent upon this Court to first decide the fundamental constitutional question of whether patients have a constitutional right to refuse treatment and whether commitment is a sufficient predicate to forcibly medicate a patient.

The evolution of facts in Roe also has separated the issues in that case from the issues in Okin. On May 6,

1980, Roe was found to be not commitable and was released to live with his family. Roe Trans. 6/19/80, p. 76. His father, who is his guardian, does not propose at the present time to authorize the forcible administration of medication to his son. Equally significant, the uncontradicted testimony at trial was that the forcible administration of antipsychotic medication in the home setting is not recommended given the inability to monitor the patient's tolerance or development of side effects. Roe Trans. 6/19/80, pp. 122-125.

Thus, in Roe, there is no case and controversy regarding (1) whether an institutionalized mental patient has a right to refuse antipsychotic medication in a non-emergency absent appointment of a guardian and (2) whether a guardian to an institutionalized mental patient may consent to the forcible administration of medication absent a substitute judgment hearing.

In fact, a stay of certiorari in this case pending a decision in Roe would be one hundred and eighty degrees from a logical handling of these two cases. In Roe, the intervenor Robert Okin, as he is Commissioner of the Massachusetts Department of Mental Health, asked the Massachusetts Supreme Judicial court to abstain from deciding the constitutional right to refuse treatment issues as they were pending before the federal courts in the Okin case. A decision in the Roe case need not be

reached if this Court were to uphold petitioner's position in the Okin case. There is no decision that can be rendered in the Roe case which will obviate the need to decide the constitutional issues in Rogers.

Moreover, the record in the Okin case is far more extensive and far better for deciding the right to refuse treatment issues than the record in the Roe case. Unlike in Okin, in Roe there is no record in the case regarding the nature of the patient populations found in state hospitals, the problems of seeking and relying on guardians for institutionalized patients, and the history of the Okin temporary restraining order and its effects on patients and staff. In the Roe case, the psychiatric testimony consisted of the testimony of three local psychiatrists. In the Okin case, in addition to the testimony of nine defendant psychiatrists, defendants called eight expert witness psychiatrists, while plaintiffs called four expert witness psychiatrists. Defendants' experts alone shared among themselves a total of twenty-four past and present chairmanships of professional societies or committees and editorial board memberships. Seven of defendants' expert witnesses taught at Harvard Medical School; seven of the defendants' experts also are presently or were formerly superintendents or directors of inpatient units of mental hospitals or of entire mental hospitals.

The Okin case has attracted national attention and has had an impact on psychiatry on a national scale over the past six years. See, Applebaum, P.S., Gutheil, T.G., "Rotting With Their Rights On': Constitutional Theory and Clinical Reality in Any Refusal by Psychiatric Patients", 7 Bulletin of the American Academy of Psychiatric Law 308 (1979); Ford, M.D., "The Psychiatrist's Double Bind: The Right to Refuse Treatment", 137 Am.J.Psychiatry, 332 (1980); Applebaum, P.S., Gutheil, T.G., "The Boston State Hospital Case: 'Involuntary Mind Control', the Constitution and the "Right to Rot'", 137 Am.J.Psychiatry 720 (1980); Curran, W.J., "Law-Medicine Notes: The Management of Psychiatric Patients: Courts, Patients' Representatives, and the Refusal of Treatment", 302 New England Journal of Medicine, 1297 (1980); Stone, A., "Recent Mental Health Litigaton: A Critical Perspective", 134 Am.J.Psychiatry 273 (1977). Okin is the case with by far the most extensive record of all the right to refuse treatment cases and is the case that this Court should accept for certiorari without delay. See, also, footnote 5 of the Petition for a Writ of Certiorari discussing the reasons this case should be accepted for certiorari immediately without delay.

CONCLUSION

For the reasons stated in this Reply Brief as well as in the Petition for a Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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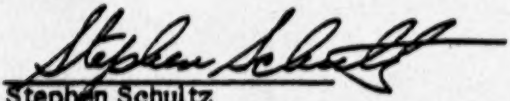

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